Supreme Court, U. S.
FILED
SEP 19 1978
MICHAEL RODAK, JR., CLERK

No. 77-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOL GOLDSTEIN, on his own behalf and on behalf of a class similarly situated,

Petitioner,

vs.

FRANCIS JOSEPH COLLIN, a/k/a **FRANK COLLIN**, and all persons acting in concert with him under the name of the National Socialist Party of America,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

DAVID GOLDBERGER
BARBARA O'TOOLE
ROGER BALDWIN FOUNDATION
OF THE ACLU, INC.
5 South Wabash Avenue, Suite 1516
Chicago, Illinois 60603
(312) 726-6180

ATTORNEYS FOR RESPONDENTS

September 20, 1978

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

TABLE OF CONTENTS

	PAGE
OPINION BELOW	2
REASONS FOR DENYING CERTIORARI	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING CERTIORARI	8
I. The Case Is Moot	8
II. The Illinois Supreme Court Was Correct In Holding That Plaintiff Sought A Prior Restraint In Violation Of The First Amendment	10
III. Petitioner's Claim That He Was Denied A Hearing Is Frivolous	12
CONCLUSION	14
APPENDIX—Exhibit 1	15

TABLE OF AUTHORITIES CITED

Cases

Allen v. Allegheny Co., 196 U.S. 458 (1905)	13
Black v. Village of Skokie, 78 L 12287 (Circuit Court of Cook County 1978)	7
Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), affirmed ..... F. 2d ..... (7th Circuit, #78-1385, May 22, 1978)	6, 7, 10
Golden v. Zwickler, 394 U.S. 103 (1969)	9, 10
Goldstein v. Collin, #50176, Illinois Supreme Court, January 27, 1978	6

Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911) .. 13

National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) 3

Near v. Minnesota, 283 U.S. 697 (1931) 11, 12

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 10, 11

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 11

Rizzo v. Goode, 423 U.S. 362 (1976) 13

Sosna v. Iowa, 419 U.S. 393 (1975) 9

United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) 10

Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605 (1978) 4, 5, 10

Weinstein v. Bradford, 423 U.S. 147 (1975) 9

Yazoo & Mississippi Valley Railway Company v. Adams, 180 U.S. 1 (1901) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOL GOLDSTEIN, on his own behalf and on behalf of a class similarly situated,

Petitioner,

vs.

FRANCIS JOSEPH COLLIN, a/k/a **FRANK COLLIN**, and all persons acting in concert with him under the name of the National Socialist Party of America,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the requested Writ of Certiorari not issue to review the judgment of the Supreme Court of Illinois entered on January 27, 1978.

OPINION BELOW

The Petition for Writ of Certiorari is filed from the order and opinion of the Supreme Court of Illinois, set forth in the Petition at pp. 1-2.

REASONS FOR DENYING CERTIORARI

I. The Case Is Moot.

II. The Illinois Supreme Court Was Correct in Holding That Plaintiff Sought a Prior Restraint in Violation of the First Amendment.

III. Petitioner's Claim That He Was Denied a Hearing Is Frivolous.

STATEMENT OF THE CASE

This case arises out of the scheduling of a now-cancelled public assembly in Skokie, Illinois, by respondents Frank Collin and the National Socialist Party of America. The assembly was to have occurred on May 1, 1977, and was to have consisted of 30 to 50 members of the party wearing military-style uniforms and would have included the swastika emblem. Party members had planned to picket silently on the sidewalk in front of the Village Hall carrying signs stating "Free Speech for White People," and the like.

Four separate lawsuits arose out of the scheduling of that assembly. The first complaint was filed on April 27, 1977, in the Circuit Court of Cook County, by the Village of Skokie on behalf of its residents. The suit sought to prevent the demonstration on grounds that it would provoke disorder and would inflict psychic trauma on large numbers of the residents. (*Village of Skokie* v. *National Socialist Party of America*, #77 Ch 2702, Complaint, ¶ 10-11.) The Village procured an injunction which barred respondents from appearing anywhere in Skokie in uniform, from wearing the swastika emblem, and from disseminating party literature. The petitioner here was Skokie's chief witness in that case, and the Illinois courts relied explicitly on his testimony in his capacity as a Holocaust survivor in first authorizing and then vacating the injunction. That case came to this Court on a procedural issue which was decided and remanded on June 14, 1977. *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43 (1977). On January 27, 1978, the Illinois Su-

preme Court vacated the injunction. *Village of Skokie* v. *National Socialist Party of America,* 69 Ill. 2d 605 (1978).

When the Circuit Court of Cook County entered the injunction against the May 1 assembly in Skokie, respondents rescheduled it for July 4, 1977. After this Court ordered the Illinois courts to grant expedited review of the injunction in the *Skokie* case, and while that injunction was still in force, petitioner Goldstein filed the present case. Petitioner's complaint sought relief against the July 4 assembly substantially identical to that which had already been obtained in the *Skokie* case and in which Goldstein had already testified. The injunction in the *Skokie* case was still in effect, pending appellate review; therefore, petitioner sought no preliminary relief in the present case. (See Petition for Certiorari, p. 5, fn.)

On July 28, 1977, respondents filed a motion to dismiss the *Goldstein* case arguing, *inter alia,* that the Illinois courts were being asked to impose a prior restraint against speech, and since prior restraints are held to be unconstitutional, the case should be dismissed. Petitioner responded to the motion with a detailed 30-page legal memorandum of which all but the last six pages were devoted to the facts and law in support of the constitutionality of a prior restraint against respondents' assembly. (The last six pages addressed procedural questions such as standing and whether the action previously filed by Skokie barred petitioner's case.) On August 1, 1977, the Circuit Court of Cook County denied the respondents' motion to dismiss, simultaneously certifying the prior-restraint question for interlocutory appeal. (Rule 308, Rules of the Illinois Supreme Court.)

As provided for by Illinois law, respondents petitioned the Illinois Appellate Court for leave to appeal. That petition was denied on November 12, 1977. Thereupon, respondents filed a "Petition for Leave to Appeal Question Certified Below or a Supervisory Order" in the Illinois Supreme Court. In support of that petition, respondents attached all briefs submitted by the parties in the trial court.

During the same time period, respondents were granted leave to appeal to the Illinois Supreme Court from the injunction against the assembly obtained in the *Skokie* case. That case was argued on September 20, 1977.

On January 27, 1978, the Illinois Supreme Court decided both the *Skokie* and the *Goldstein* cases. In the *Skokie* case, it held that the injunction obtained by the Village, *and sought by petitioner Goldstein,* was an unconstitutional prior restraint on speech. Thus the Court stated:

> In summary, as we read the controlling Supreme Court opinions, the use of the swastika is a symbolic form of free speech entitled to First Amendment protections. Its display on uniforms or banners by those engaged in peaceful demonstrations cannot be totally precluded solely because that display would provoke a violent reaction by those who view it. Particularly is this true where, as here, there has been advance notice by the demonstrators of their plans so that they have become, as the complaint alleges, "common knowledge" and those to whom the sight of the swastika, banner or uniforms would be offensive are forewarned and need not view them. A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen. *Village of Skokie* v. *National Socialist Party of America, supra.,* at 618.

In the *Goldstein* case, the Court held that the decision in the *Skokie* case was controlling:

> The Circuit Court of Cook County denied a motion to dismiss a complaint for injunction seeking to restrain defendants from marching and demonstrating in the Village of Skokie while wearing or displaying Nazi insignia. The Appellate Court denied a petition for leave to appeal under Rule 308 and defendants have petitioned this Court for leave to appeal. In *Village of Skokie* v. *National Socialist Party of America,* No. 49769, adopted this term, we held that the proposed march or demonstration and the display of Nazi insignia could not be enjoined. The petition for leave to appeal is allowed and, in the exercise of this Court's supervisory jurisdiction, it is ordered that the Circuit Court of Cook County dismiss the injunction complaint. Clark, J. took no part. *Goldstein* v. *Collin,* #50176, Illinois Supreme Court, January 27, 1978.

The Village did not seek a writ of certiorari from this Court in the *Skokie* case. Petitioner Goldstein filed his petition for certiorari in this case on June 16, 1978. He also unsuccessfully sought stays on June 20 and 23, 1978. (A-1064)

The third suit was filed on August 13, 1977, in the United States District Court by respondents to challenge the constitutionality of certain ordinances passed by the Village of Skokie to bar respondents' public assembly. Again, petitioner Goldstein testified at length on behalf of the Village as to his Holocaust experiences. The Village also presented other testimony concerning allegations of psychic trauma which it contended would result from respondents' activities in Skokie. On February 23, 1978, the District Court held that relevant portions of the ordinances were unconstitutional, *Collin* v. *Smith,* 447 F. Supp. 676 (1978); and on May 22, 1978, the United States Court of

Appeals for the Seventh Circuit affirmed that decision, ... F. 2d ..... (7th Cir., #78-1385, May 22, 1978). On June 12, this Court denied a motion for a stay pending a ruling on a Petition for Certiorari. (*Smith* v. *Collin,* A-1037). The Village filed its Petition for Writ of Certiorari with this Court on June 16, 1978. (*Smith* v. *Collin,* 77-1736.) Thereafter, the Village granted a permit for respondents to hold a public assembly in Skokie on June 25, 1978.

On June 22, 1978, another lawsuit was filed in the Circuit Court of Cook County seeking to enjoin respondents' assembly. Louis Black, a private citizen, filed the suit charging that the Village's permit was wrongfully issued. *Black* v. *Village of Skokie,* No. 78 L 12287. Preliminary relief to enjoin the June 25th assembly was denied by the Circuit Court of Cook County.

By June 22, 1978, all legal barriers to respondents' planned assembly had been removed. However, respondents cancelled the June 25th assembly in Skokie and held assemblies at two separate locations in Chicago instead. In reliance on respondents' announcement of cancellation of the assembly, the Village of Skokie revoked the permit on June 23, 1978. (Ex. 1) At present, respondents have no plans to hold an assembly in Skokie, and no permit applications for such an assembly are pending at this time.

REASONS FOR DENYING CERTIORARI

The Petition for Writ of Certiorari should be denied in this case because the case has become moot and because petitioner presents no substantial federal questions.

I. THE CASE IS MOOT.

The petitioner's case is moot. His prayer asked for an order restraining an assembly on June 4, 1977. That date has long since passed and the assembly in question has been cancelled. (Ex. 1) Specifically, the prayer states:

> Wherefore, plaintiff, on his own behalf and on behalf of all those similarly situated, prays this Court for issuance of a preliminary and permanent injunctive relief restraining Frank Collin, his agents, employees, successors, and all those acting in concert with him, including those acting in the name of the National Socialist Party of America, from engaging in any demonstration, rally, parade, or march of any kind or description, in or through the Village of Skokie, Illinois, at which the uniform of the Nazi party (including brown shirts or swastika armbands) is worn by the participants, or the insignia of the Nazi party are displayed, and from engaging in any said demonstration, rally, parade or march in or through the Village of Skokie on *July 4, 1977.* (Complaint, p. 7) (Emphasis added.)

In light of the cancellation of respondents' assembly and the limitation of the relief prayed for to any demonstration on July 4, 1977, a decision by this Court to review the petitioner's case would resurrect a dispute which has become purely academic. Moreover, issuance of a ruling on the constitutional questions raised by petitioner would

amount to an advisory opinion. This Court has repeatedly held that it does not issue advisory opinions. In *Golden* v. *Zwickler,* 394 U.S. 103 (1969), this Court reaffirmed this position:

> [T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of Constitutional issues, concrete legal issues, presented in actual cases, not abstractions are requisite. This is as true of declaratory judgments as in any other field. (Quoted *from United Public Workers of America* v. *Mitchell,* 330 U.S. 75, 89 (1947).)

The application of this principle is particularly important here because the petitioner seeks injunctive relief only on a single date for an event that has been cancelled. His complaint does not even seek declaratory relief.

The cancellation of the event in question also renders this case moot under *Sosna* v. *Iowa,* 419 U.S. 393 (1975), and *Weinstein* v. *Bradford,* 423 U.S. 147 (1975). Those cases defined the reach of the mootness doctrine under circumstances "capable of repetition yet evading review" because the challenged action was too short in duration to permit the litigation to be completed. In such cases, the Court said:

> *Sosna* decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinstein* v. *Bradford,* 423 U.S., at 149.

The present case—not an action in which a class was ever certified or in which a motion to certify was made—does not meet either of the requirements articulated in *Weinstein*. First, the right of respondents to assemble and speak in Skokie has been fully litigated in the Illinois and federal courts, each court ruling for respondents. *Village of Skokie* v. *National Socialist Party of America*, 69 Ill. 2d 605 (1978); *Collin* v. *Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), affirmed ..... F. 2d ..... (7th Circuit, #78-1385, May 22, 1978). Second, there are no permit applications pending and no plans for any assembly in Skokie by respondents. Thus, the likelihood of repetition—particularly where, as here, there has never been any public appearance in Skokie by respondents—does not exist.

The likelihood of repetition is only a hypothetical possibility. Yet, as this Court has emphatically stated: "A hypothetical threat is not enough." *United Public Workers of America* v. *Mitchell*, 330 U.S., at 90. "The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." *Golden* v. *Zwickler*, 394 U.S., at 110.

II. THE ILLINOIS SUPREME COURT WAS CORRECT IN HOLDING THAT PLAINTIFF SOUGHT A PRIOR RESTRAINT IN VIOLATION OF THE FIRST AMENDMENT.

A prior restraint against a public assembly, the wearing of military-style uniforms, and displaying of a symbol is forbidden by the First Amendment. That the Constitution prohibits prior restraints on speech is beyond dispute. The United States Supreme Court has repeatedly held so in innumerable cases. Most recently in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), Chief Justice Burger, speaking for the Court observed:

> The thread running through all of these cases is that *prior restraints* on speech and publication *are the most serious and the least tolerable infringement on First Amendment rights*. 427 U.S., at 559. (Emphasis added.)

In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), this Court explicitly ordered the Illinois courts to vacate an injunction against leafletting anywhere in a specified municipality on grounds that such an injunction is presumptively illegal:

> Any prior restraint on expression comes to this court with a "heavy presumption" against its constitutional validity. *Organization for a Better Austin* v. *Keefe*, 402 U.S., at 419.

The presumption of unconstitutionality of an injunction serving as a prior restraint issued by state court judges was articulated long ago in *Near* v. *Minnesota*, 283 U.S. 697 (1931), and remains black letter law today. In *Near*, the United States Supreme Court invalidated an injunction, barring publication of allegedly libelous material, granted by a state court at the instance of the county attorney of Hennepin County, Minnesota. The injunction forbade publication of a local newspaper as a "public nuisance" on the ground that it had engaged in a "malicious, scandalous and defamatory" libel by accusing the mayor and the chief of police of being under the control of a "Jewish gangster." In rejecting the injunction because it was a prior restraint, the Supreme Court cited Blackstone:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what

> sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. 283 U.S., at 714, citing 4 Bl.Comm. 151, 152.

There is no case cited by petitioner which upholds an injunction against political communication based upon its content. Thus, the Illinois Supreme Court order dismissing the complaint seeking an injunction against speech and assembly is consistent with all previous authority of this Court and does not warrant review of the decision of the Supreme Court of Illinois by this Court.

III. PETITIONER'S CLAIM THAT HE WAS DENIED A HEARING IS FRIVOLOUS.

Finally, petitioner contends that he was denied due process because the Illinois Supreme Court relied on the pleadings and detailed briefs submitted to the Circuit Court of Cook County, as well as the ruling in the Village's own case, in ordering the complaint dismissed.

The implication in petitioner's Statement of Facts that the Illinois Supreme Court considered no briefs on the merits is misleading, as is his contention that he did not participate in the Skokie litigation. (Petition, pp. 6-7.) The record before the Illinois Supreme Court consisted of respondents' petition for interlocutory appeal of denial of their motion to dismiss, petitioner's response, and all briefs filed in the trial court, including petitioner's 60-page brief detailing his contentions. Furthermore, the Illinois Supreme Court had the entire record in the *Village of Skokie* v. *National Socialist Party of America* before it, including the full testimony of petitioner Goldstein who had served as the chief witness in that case.

That the Illinois Supreme Court could choose to consider pleadings and lengthy briefs (not to mention petitioner's testimony in the *Skokie* case) in determining the sufficiency of the complaint under state appeals procedures is a matter within the discretion of the court. It is well established that matters of state practice are left to the state courts and are not appropriate for review in the United States Supreme Court. *Allen* v. *Allegheny Co.*, 196 U.S. 458, 465-466 (1905); *Yazoo & Mississippi Valley Railway Company* v. *Adams*, 180 U.S. 1, 8-9 (1901). Principles of federalism require such deference by this Court. See *Rizzo* v. *Goode*, 423 U.S. 362 (1976).

The sole exception to this rule is made when state practice is so extremely arbitrary as to deny due process. *Kentucky Union Co.* v. *Kentucky*, 219 U.S. 140, 158-161 (1911). Petitioner can complain of no such arbitrariness. The Illinois Supreme Court decided only a question of law determining whether or not the respondents' motion to dismiss the complaint seeking injunctive relief should be granted. The Court had before it not only the extensive briefs filed in this case, but also the record in the *Skokie* case including petitioner Goldstein's own testimony, which the Illinois courts referred to in their opinions.*

In light of the record before the Illinois Supreme Court, petitioner's claim that he was denied a hearing in that Court is without any support legally or factually. It is, thus, frivolous and cannot serve as a basis for the granting of a petition for a writ of certiorari.

---

* Petitioner lists four points which he claims he could not adequately make. (Petition, pp. 14-16). In fact, each of petitioner's points is made at great length in the brief and reply to plaintiff's petition submitted by him in the Illinois courts.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID GOLDBERGER
BARBARA O'TOOLE
ROGER BALDWIN FOUNDATION
OF THE ACLU, INC.
5 South Wabash Avenue, Suite 1516
Chicago, Illinois 60603
(312) 726-6180

ATTORNEYS FOR RESPONDENTS

APPENDIX

Exhibit 1

The VILLAGE OF SKOKIE
673-0500
5127 OAKTON ST. • SKOKIE, ILL. 60076

SKOKIE ILLINOIS

OFFICE OF THE VILLAGE MANAGER

June 23, 1978

Mr. Frank Collin
National Socialist Party of America
Rockwell Hall
2519 W. 71st Street
Chicago, Illinois 60629

Dear Mr. Collin:

This is to formally advise you of the action taken by the President and Board of Trustees of Skokie on June 22, 1978. In view of your public statement of intention to cancel your demonstration assembly in Skokie on June 25, 1978, the permit heretofore issued in conjunction with that assembly has been revoked.

Very truly yours,

John Matzer, Jr.
Village Manager

JM:re
cc: Mr. David Goldberger ✓
American Civil Liberties Union

Harvey Schwartz
Corporation Counsel